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IN THE

Supreme Court of the United States

October Term, 1968
No. 73

ROBERT NEWTON GARDNER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Superior Court of the County of San Luis Obispo, State of California

BRIEF FOR RESPONDENT ~~IN OPPOSITION~~

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

JACK K. WEBER,
Deputy Attorney General of the State of California,

600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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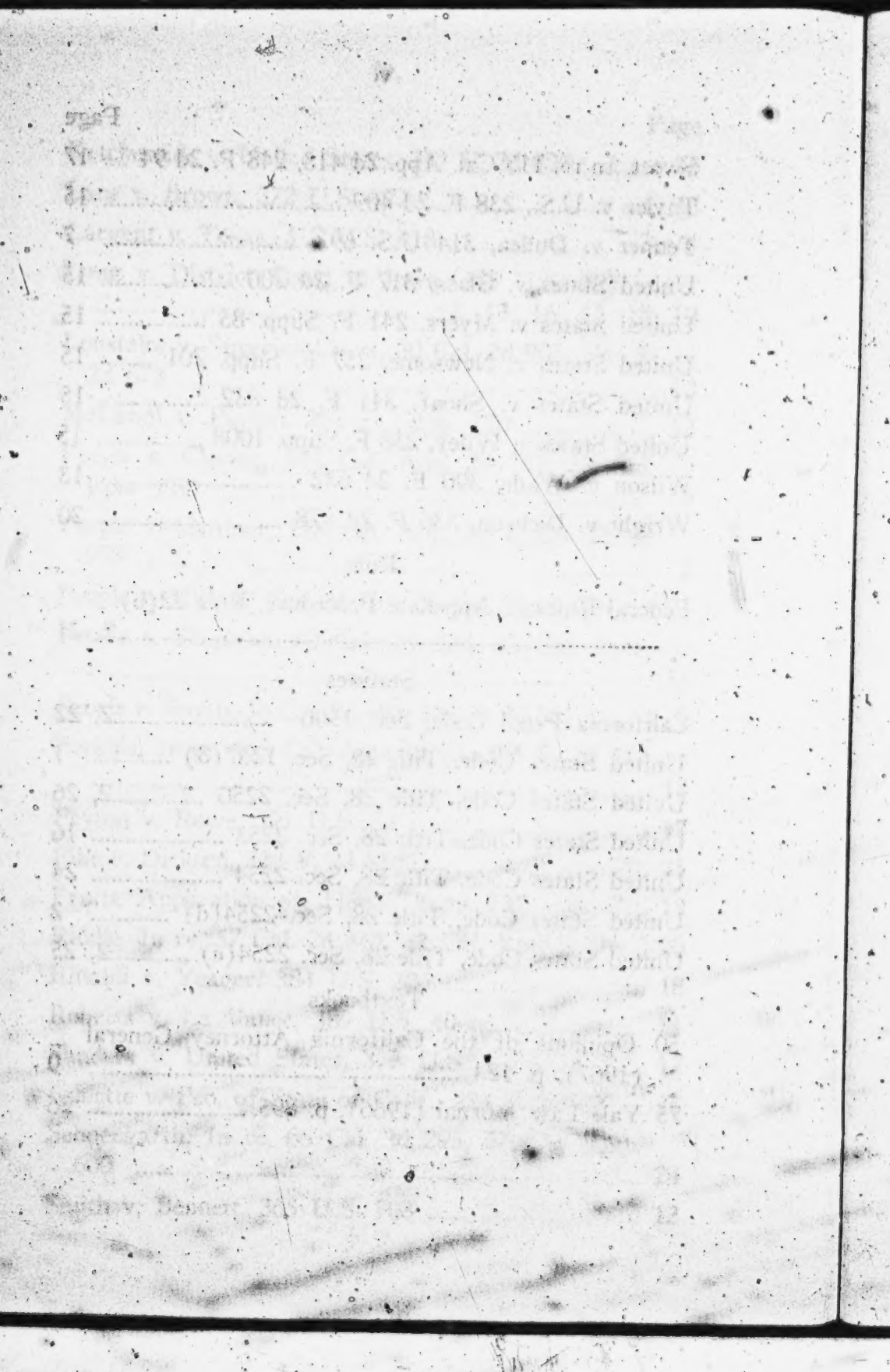

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

A brief opinion or order was filed in the Superior Court and is set forth in the record. The petitions to the California Court of Appeal and Supreme Court were denied without opinion.

Jurisdiction

The jurisdiction of this Court would be invoked under 28 U.S.C. §1257(3).

Questions Presented

Since California does not permit an appeal from a denial of habeas corpus, can it properly seek to avoid the unnecessary preparation of transcripts by requiring that an indigent who seeks a free transcript of an evidentiary hearing in a habeas corpus case apply

for the transcript in the court from which he will seek relief with his allegations so that his need for the transcript can be evaluated or whether he is automatically entitled to it on his representation that he wants it for reference in filing future habeas corpus applications?

Statutes Involved

28 U.S.C. §2254(d) and (e);

28 U.S.C. §2250;

Rule 22(b) of the Federal Rules of Appellate Procedure.

Section 1506, California Penal Code.

(These are set forth in the Appendix.)

Statement of the Case

Petitioner is a California state prisoner serving an indeterminate 10-year term for a 1960 narcotics offense and a life term for robbery. See *People v. Gardner*, 128 Cal. App. 2d 1, 274 P. 2d 908.

A. The Petitions in the Superior Court

On September 23, 1966, petitioner filed a petition for writ of mandate or injunction in the San Luis Obispo Superior Court. (A.2.) He alleged that he had accumulated legal-like documents that would show a denial of his constitutional rights, but was transferred without adequate time to prepare or pack his legal records, and all of his legal materials were either misdirected, lost, or otherwise denied to him. (A.4-A.5.)

The petition was at first denied, but petitioner's motion to vacate was granted and the matter was set for hearing. (A.19-A.26.)

On November 16, 1966, petitioner filed a petition for writ of habeas corpus,[1] alleging that because he had not been furnished transcripts he was denied a timely and meaningful coram nobis appeal. He also complained of insufficient access to legal materials and urged that this had hampered his legal efforts. He said that for five weeks after his transfer he was denied all legal materials and that on October 4, 1966 only limited property was afforded him. He said letters he had written at other institutions took up to 67 days for delivery. He said that he had not been permitted to write to a specific lawyer and he had been denied "privileged communication" with court and counsel. Petitioner complained that on September 16, 1966 the Director of Corrections wrote a transmittal letter specifying the law books in each library and the library no longer had the United States Code, the Rules of the Federal District Court, and the Federal Rules on Criminal and Civil Procedure. Personally owned law books were not permitted. As a numerical index to the exhibits, petitioner specified some 80 legal documents in his possession, saying it was less than half what he originally had.

On December 6, 1966, petitioner moved for the appointment of counsel. It was ordered that the public defender be appointed. (A.28-A.30.)

B. The Trial Court's Rulings

By memorandum decision on February 15, 1967, the court determined that the petitions were for habeas corpus, it recited that evidence was taken and points and authorities submitted and it held:

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[1]By letter dated Sept. 18, 1968 counsel of petitioner has requested the clerk to add this petition to the record.

"1. There was no invasion of the constitutional rights of the petitioner;

2. That there occurred no impediment to his access to the courts;

3. That he had reasonable access to the courts and reasonable access to law books and other legal materials sufficient to meet the requirements of the law." (A.31.)

C. The Motion for Transcripts

On March 1, 1967, petitioner moved for a free transcript of all proceedings. (A.32.) He wanted:

1. All pleadings, motions, memoranda, and affidavits in support thereof as presented by petitioner and respondent;

2. All of respondent's exhibits;

3. The clerk's minutes;

4. The court's decision;

5. The complete record of oral and documentary evidence. (A.33.)

Petitioner said: "Petitioner does not complain of the full hearing accorded him by this Honorable Court. The hearing was full and fair and it is the contention of the petitioner that the evidence adduced at that hearing will substantiate the claims of petitioner." He said the transcript was necessary so he could properly present his claims to the California Supreme Court. He said, "Those transcripts will be necessary to petitioner in the proper preparation of his petition seeking review of the hearing had in the instant case. In

addition, the transcripts will be necessary to prove the petitioner's allegations of constitutional deprivation spelled out during that hearing and to substantiate the allegations and cause of petitioner by the evidence adduced at that hearing." He said that he had a right to establish a prima facie case for the issuance of a writ. (A.36-A.40.)

An order was entered on March 1, 1967, denying the motion. It read as follows:

> "Petitioner seeks a copy of the transcript of proceedings had before Honorable Timothy I. O'Reilly. These are sought as evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus.
>
> "The petitioner may present all matters which were involved in his hearing before Judge O'Reilly by filing a new Petition For Writ of Habeas Corpus before a court having jurisdiction of his matter (including but not limited to the California Supreme Court.) His request for relief by such a court will not be affected by the action of Judge O'Reilly and aside from a statement in his petition that he has sought relief in this court, with the date thereof stated, none of the proceedings here will be of concern to the court before whom the new petition is presented. If that court for some reason of its own wants a copy of the record, it can order one prepared.
>
> "There is no appeal from a denial of a petition for Writ of Habeas Corpus." (A.43.)

D. The Attempt to Secure Appellate Action on the Transcripts

Thereafter, on March 14, 1967, petitioner filed a Petition For Writ of Certiorari in the California Court of Appeal. (A.44.) Petitioner alleged that a transcript of the evidentiary hearing "is necessary as an exhibit and as reference to the full hearing had in the matter and essential to petitioner as reference in the aid of the preparation for a petition. . . . Moreover, the transcripts of that hearing is necessary to petitioner so that he may properly present his claims to those courts and to allow those courts to review the entire record adduced thereon so they may properly adjudicate the issues and review the Superior Court's decisions regarding the federal questions presented by the petitioner." (A.47.)

This was denied on March 23, 1967, without opinion. (A.52.)

On or about April 20, 1967, petitioner filed for a hearing in the California Supreme Court. (A.53.) Here he said (at p. 4),

> "The transcripts . . . as an exhibit and as reference to the evidence taken in the matter . . . is essential to petitioner as he desires to present the same matter to an appellate court and the federal courts. Those courts would be interested in the transcript and may not need any additional testimony. Moreover, petitioner needs the transcripts so that he may be able to submit the matter on the of the evidentiary hearing had in the matter. Furthermore, the transcript of that hearing is necessary to the petitioner so so that he may properly present his claims to those courts and to allow those courts to review the entire record and

the evidence adduced therein so they may properly adjudicate the the issues and review the Superior Court's decisions . . ." (A.56-A.57.)

This petition was denied on May 10, 1967.[2] (A.62.) The present petition for certiorari followed.

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[2]The front page of petitioner's brief indicates that certiorari is directed to this order of the Supreme Court of the State of California. Petitioner's statement as to jurisdiction also alludes to the order of the Supreme Court. The last portion of his statement of the case refers to seeking review of the Supreme Court order. (Pet. Op. Br. pp. 1, 8.) However, he also says, in footnote 22, at page 22 of Petitioner's Opening Brief, while arguing another issue, that the trial court's denial of relief is a final judgment of the highest state court having jurisdiction, thus opening the way for a direct petition for certiorari to this court. (The Petition for Certiorari was filed within 90 days of both the Superior Court and Supreme Court Orders.) The order granting certiorari designates certiorari to the Superior Court. (A. 63.)

The problem of which order we are reviewing has two ramifications: One, petitioner must show some proper avenue to this court, and, two, the record before us may be influenced by the choice of order. (The California Supreme Court would have had before it only the Petition For Hearing and the Petition For Certiorari in the Court of Appeal.)

The Superior Court order is not reviewable because it is not the judgment of the highest state court. *Tenner v. Dullea*, 314 U.S. 692 (1941); *cf. Largent v. Texas*, 318 U.S. 418, 421 (1943). It could not be argued that on habeas corpus or other writs the state appellate courts are powerless to deal with a request for a transcript needed by an indigent. See *Gross v. Superior Court*, 42 Cal. 2d 816, 270 P. 2d 1025.

However, even if certiorari were brought against the Supreme Court order we submit that it would not be proper. Petitioner's attack on the Supreme Court order rests on the assumption that certiorari is a proper method of presenting a claim for transcripts. We have found no case in which it has been so applied in California, and none has been cited.

Since there is nothing to prevent petitioner from following the usual state practice, presenting his substantive allegations and amending his allegations if transcripts are granted, it is also a reasonable state procedure, and an adequate nonfederal ground of decision, severable from any federal ground, to require application to the court in which the claim is to be presented, with a statement of the allegations. The fact that the Supreme Court of the State of California has denied the petition for hearing without opinion does not bar us from inferring that this might have been its reasoning. *Durley v. Mayo*, 351 U.S. 277, 284 (1956).

Summary of Argument

Respondent submits that California's procedure of requiring an indigent petitioner to first present his allegations is open to no federal objection and is sustainable as an adequate nonfederal ground. The possibilities of economic waste inherent in permitting prisoners to become their own judges of what they need in the way of transcripts of evidentiary hearings in habeas corpus cases justifies a screening procedure.

ARGUMENT

Petitioner Should Not Be Entitled to a Transcript of a Habeas Corpus Hearing Without Establishing His Need for It in the Court to Which He Is Presenting His Allegations Since There Is No Appeal Under California Procedure

California furnishes a free transcript to an appealing defendant in a criminal case. It does not condition that right or dilute it once an appeal is taken. *People v. Smith,* 34 Cal. 2d 449, 453, 211 P. 2d 561.

A. California Properly Requires Presentation of Substantive Questions Before Transcripts Will Be Prepared

The defendant who does not appeal is not furnished with transcripts in California before he has specified his claims of error. This was held to be the rule in *People v. Chavez,* 243 Cal. App. 2d 761, 52 Cal. Rptr. 633. *See, also,* 50 Ops. Cal. Atty. Gen. 124 (1967).

Petitioner does not seek here the transcript of his criminal cases. He brought claims concerning access to legal materials and the courts, and he seeks a transcript of the evidentiary hearing on those issues so he can go to the California appellate courts and the federal courts.

We submit that he is not entitled to such a transcript without a showing of need, and he must present his allegations first. At that time, it can be decided whether a transcript has to be prepared or whether the allegations may be disposed of without the expense and effort involved, or in some other way. Petitioner does not allege any inability to summarize the evidence or to frame allegations based upon it. What he did say in his motion of transcripts was conclusory. (A.36.) What

he said in his original petitions did not necessarily reflect the issues that would be raised in the appellate courts. The Superior Court, in denying the transcripts, explained the proper procedure, but petitioner chose to proceed first to secure the transcripts.

This Court has carefully avoided holding that a free transcript must be furnished in every case on direct appeal from the criminal conviction. It has suggested that other techniques may be just as good. What was said in *Draper v. Washington*, 372 U.S. 487, 495-96 (1963), seems pertinent:

> "Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for

> adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions.

In *Griffin v. Illinois,* 351 U.S. 12, 20 (1956), the landmark case in the indigent-transcript area, it was explicitly said, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it." *Cf. Roberts v. La Vallee,* 389 U.S. 40 (1967).

As Justice Frankfurter said, concurring in the judgment in *Griffin* (at p. 24), "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

California procedure requires a petitioner for habeas corpus, whether he be at the trial or appellate level, to present his claim and then the court in which the claim is offered is to determine the need for a transcript. Petitioner did not follow that procedure and here seeks to enforce a right to compel a transcript from a court other than the one to which he may present his claim. We respectfully submit that the im-

plicit California position not to furnish a free transcript automatically in every case, absent a showing of actual need, is open to no meritorious federal objection. We respectfully submit, too, that the requisite screening procedure of requiring application for the transcript to the court in which the complaint is to be made is also reasonable and open to no federal complaint. Since that court will pass upon the substantive claims, it will be in the best posture to evaluate what transcripts, if any, are necessary in that decisional process.

In *Ex Parte Elmer Davis*, 318 U.S. 412 (1943), it was said that the United States Supreme Court could not assume that a state appellate court would refuse to use its process to bring before it such parts of the record as may be necessary for a decision of the case. This Court said that until the State Supreme Court acted the remedies afforded by state appellate procedure have not been fully exhausted. This would seem to indicate that the proper procedure is first to present the allegations to the state appellate courts, and that only the denial of the substantive allegations, or the procedure by which they are denied, would be reviewable.

See, too, *McLaren v. Peyton*, 262 F. Supp. 120, 121 (W.D. Va. 1966).

B. California Does Not Condition Access to Appellate Habeas Corpus

We are aware that this Court has acted to prevent an indigent from being barred from habeas corpus because he has not paid a filing fee, *Smith v. Bennett*, 365 U.S. 708, or being barred from an appeal in a habeas corpus matter because he cannot pay for transcribing the proceeding in the trial court. *Long v. Dis-*

trict Court of Iowa, 385 U.S. 192 (1966). It was said therein: ". . . a state cannot condition its availability [a post conviction procedure] to an indigent upon any financial consideration." In *Lane v. Brown*, 372 U.S. 477 (1963), it was observed that the *Griffin* principle is not limited to direct appeals, but was extended to post-conviction proceedings. (Appeal transcript allowed in *coram nobis* case where appeal could only be perfected by filing transcript in appellate court.)

California does not condition access to post-conviction relief. Petitioner had an evidentiary hearing in the Superior Court and counsel was appointed for him. His access to the Superior Court was conditioned on no financial consideration.

Neither does California condition petitioner's access to its higher courts, the Court of Appeal and the Supreme Court. Every indigent prisoner may file at either of those levels and set out his allegations in a petition.

It is true that there is no right of appeal by a prisoner from the denial of his petition in the Superior Court. See *Loustalot v. Superior Court*, 30 Cal. 2d 905, 913, 186 P. 2d 673. However, every prisoner—rich and poor alike—has the right to file petitions for habeas corpus in the Courts of Appeal and the California Supreme Court.

C. California's Procedures Have Been Sustained in the Federal Courts

California's screening procedure to evaluate need for transcripts has been sustained in the federal courts. In *Wilson v. Wade*, 390 F. 2d 632, 633-34 (9th Cir. 1968) it was said:

> "There is no doubt but that an indigent state prisoner is entitled to a free transcript for use

in an appeal from his state conviction where that is needed and that he has a like right to a free transcript in order to prosecute a claim for post conviction relief where that is essential in order to permit him to demonstrate his right to such relief. See the cases cited in Roberts v. La Vallee, 389 U.S. 40, 42. But the question here is whether Wade has presented any grounds for post conviction relief, the prosecution of which might require him to have the use of a trial transcript.

"This court dealt with this situation in McGarry v. Fogliani, 9 Cir., 370 F. 2d 42, 44, where we said respecting that appellant: 'He makes no showing whatever that any prejudicial errors occurred that would have called for a reversal of his conviction. There is nothing in the claim that the sentencing judge refused to allow an appeal from the conviction before appellant was sentenced. The right to appeal attached when appellant was sentenced. Nor is the court required to order a copy of appellant's trial transcript merely to enable appellant to "comb the record in the hope of discovering some flaw."'

"In the case before us the trial court failed to find that Wade was claiming that there was any error which occurred in the proceedings which led to his conviction which would warrant the granting of post-conviction relief.

"So far as the district court's findings are concerned, our holding in McGarry v. Fogliani, supra, would require us to say that Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw. The judgment must be reversed."

Not only is this California procedure sustained by federal courts, but also it is the general kind of procedure federal courts follow. See *Ketcherside v. United States*, 317 F. 2d 807 (6th Cir. 1963); *United States v. Glass*, 317 F. 2d 200, 202 (4th Cir. 1963); *Jarvis v. United States*, 381 F. 2d 712, 713 (9th Cir. 1967); *United States v. Newsome*, 257 F. Supp. 201, 203 (N.D. Ga. 1966); *Tayler v. U.S.*, 238 F. 2d 409, 411 (9th Cir. 1956); *United States v. Shoaf*, 341 F. 2d 832 (4th Cir. 1964); *United States v. Myers*, 241 F. Supp. 85 (E.D. Pa. 1965); *United States v. Wiley*, 238 F. Supp. 1008 (D.D.C. 1965); *Application of Pruitt*, 119 F. Supp. 737 (W.D. S.C. 1954).

D. California's Rule About Transcripts Parallels Other Rules

California sets a similar test either for the appointment of counsel or for the conduct of a hearing. *People v. Shipman*, 62 Cal. 2d 226, 230-231, 42 Cal. Rptr. 1. The rule is also well developed in federal courts that appointment of counsel in habeas corpus proceedings is not automatic, as at trial or on direct appeal. See: *Eskridge v. Rhay*, 345 F. 2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996, 86 S. Ct. 582, 15 L. ed. 2d 483, reh. denied, 383 U.S. 922, 86 S. Ct. 903, 15 L. ed. 2d 679; *Hatfield v. Bailleaux*, 290 F. 2d 632, 635 (9th Cir. 1961), cert. den. 368 U.S. 862, 82 S. Ct. 105, 7 L. ed. 2d 59; *Schlette v. Peo. of State of Calif.*, 284 F. 2d 827, 836 (9th Cir. 1960).

Under this rule it is clear that a person in custody would not normally be entitled to counsel to assist him in finding allegations to make on habeas corpus.

The rule followed in California regarding transcripts parallels the rule that prevails with regard to counsel.

Both rules place the rich in a better position than the poor, but this court does not condemn all discriminations, only those that are invidious. This is a line that is properly drawn due to the expense involved in preparing transcripts and the possibility of abusive demands by prisoners.

E. Petitioners Cannot Properly Rely on Long to Invalidate California Rules

Petitioner seeks to meet this situation by placing reliance upon *Long v. Dist. Court of Iowa*, 385 U.S. 192 (1966), wherein it was held that on appeal in a habeas corpus case, appeal being allowed in Iowa, a transcript had to be furnished under the circumstances apparent there. He argues that only the "narrow difference" between appeal and an original writ proceeding in the appellate court could provide a distinction from *Long* and he urges that the "basic conditions" underlying *Long* and *Griffin* are present at bench. (Pet. Op. Br. p. 12.)

In approaching this contention, permit us to make several preliminary observations. First, the argument bears the implication (although the implication may not have been intended) that in the ordinary appeal after a denial of a habeas corpus petition the indigent will always, or almost always, secure a transcript whereas he is deprived because of the "one peculiar facet of California habeas corpus procedure."

Actually, in the federal courts, for example, the individual whose petition is denied cannot appeal without a certificate of probable cause. 28 U.S.C. §2253. Our experience has been that such a certificate is denied in a substantial number of cases in Southern California and we can recall only rare instances in South-

ern California where a reporter's transcript of a habeas corpus hearing concerning a state prisoner has been prepared for a federal appeal.

Neither has California attempted to evade or avoid the holding of the *Long* case (*Long v. Dist. Ct. of Iowa, supra,* 385 U.S. 192) by not allowing an appeal. California procedure is a continuation of the common law, where a denial of the Writ of Habeas Corpus was not a final judgment, was not subject to the doctrine of res judicata and need not be reviewed by an appellate court since the petitioner was entitled to present his petition anew to every judge in the realm, trial and appellate. See *Fulks v. Walker,* 224 Ark. 639, 641, 275 S.W. 2d 873 (1955); *see* also *Sanders v. United States,* 373 U.S. 1, 8 (1963).

Nor should it be assumed that California's method is necessarily inferior to an appeal procedure. It is faster and this is in large part due to the reliance on allegations instead of transcripts and briefs. In fact appellate habeas corpus is resorted to where appeal would be too slow. *In re Ali,* 230 Cal. App. 2d 585, 590, 41 Cal. Rptr. 108; *In re Howe,* 135 Cal. App. 2d 604, 607, 287 P. 2d 510; *In re Sweet,* 113 Cal. App. 2d 413, 414, 248 P. 2d 94.*

In an original writ proceeding in the appellate court, the petitioner may have the advantage of having the

*This element of speed bears on the federal-state relationship and the exhaustion of state remedies. This Court has expressed interest in the promptness with which claims are adjudicated. *Peyton v. Rowe,* 391 U.S. 54, 62 (1968). While it may be possible to find occasional writ cases that do not progress speedily through California appellate courts, the rapidity with which petitioner went through the California court system to bring four petitions for certiorari to this court is a convincing laboratory demonstration of this particular advantage.

appellate court make factual determinations so that he does not have to return to the trial court that ruled against him.

It may also be noted that California's appellate writ procedure may involve review of the lower court proceeding and operate as if it were an appeal. *In re Perkins*, 165 Cal. App. 2d 73, 81, 331 P. 2d 712 said: "It does not occur to us that that remedy [habeas corpus] is any more or less efficacious than would be an appeal." *In re Jones*, 260 A.C.A. 957, 961 reviewed on appellate habeas corpus errors occurring in the conduct of a collateral attack proceeding in the court below.

Yet it would not do justice to California procedure to describe appellate habeas corpus as an appeal. There are at least three possible reviews at three different levels of the judicial hierarchy, each independent of the other, and each extending to the facts as well as the law, with every level of the court system able to conduct a full new inquiry, and the usual practice is to make a fresh determination.

This Court has not held that states must establish avenues of appellate review. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). It is submitted that California has by far surpassed this standard with a full scale appellate remedy that provides relief in a number of respects superior to that in an appeal.

Turning more directly to an analysis of the *Long* holding, we note that petitioner recognizes that there

is a difference in Iowa and California procedure, that Iowa allows appeals from denials of habeas corpus, while California utilizes an original writ proceeding. He terms this a narrow difference, but the distinctions in form and procedure between an appeal and an application for habeas corpus are considerable and well recognized. The former involves direct review of a judgment below; the latter encompasses pleading in an original proceeding where the issues are developed by means of allegations.

In pressing the claim that the basic considerations underlying *Griffin* and *Long* are present here, he advances several arguments, which we evaluate as follows:

1. He argues that his claim is inherently complex. It is submitted that in comparison to the usual lawsuit the factual issues here were simple. Petitioner said he was not supplied enough law books. This involved establishing what books were in the prison library and available to him through the State library. He said his personal legal materials were not allowed to him. This too involved a determination of what he was allowed in his cell, what was kept from him by the prison authorities and when and how he could see it, and what he sent home, and whether anything had been destroyed.

2. Petitioner speaks of the discretion of a reviewing court to grant a hearing and he speaks of a "considerable skepticism" that he has to overcome with transcript references. (Pet. Op. Br. pp. 14, 17.) He cites no cases that authorize a discretion to reject an adequate allegation of a deprivation of a federal constitutional right. Nor does he cite cases that allow a skep-

ticism of adequate allegations to be a sufficient basis for rejecting them. Our understanding of the law is that if the allegations are sufficient the private opinion of the court as to the likelihood that the allegations could win evidentiary support is irrelevant. *See Wright v. Dickson*, 336 F. 2d 878, 881 (9 Cir. 1964); *Pike v. Dickson*, 323 F. 2d 856, 861 (9 Cir. 1963).

3. Petitioner points to the fact that the superior court issued an order to show cause. The inference arises that this endorses the petition as substantial and as necessitating a "careful scrutiny of the facts and weighing of the relevant policies." (Pet. Op. Br. p. 15.) We respectfully submit that the decision to issue an order to show cause or to grant a hearing does not involve an endorsement of the claim. An examination of the allegations is not a sufficient basis for judging the strength of the proof that later may be adduced in support thereof. *See Ingle v. Fitsharris*, 283 F. Supp. 205, 207 (N.D. Calif. 1968); see too footnote 2 on page 162 in *Benson v. State of California*, 328 F. 2d 159 (9 Cir. 1964).[4]

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[4]Petitioner also makes the following argument: "Had he instead chosen to proceed first in the Court of Appeal, he would clearly have been entitled to petition the California Supreme Court for a hearing followed by a denial and would thus have been within the precedents of this Court requiring the provision of a free transcript." (Pet. Op. Br. p. 13.) California appellate courts normally require that a factual issue first be presented to a trial court. *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759. When the California appellate court does hold an evidentiary hearing it is invariably done by selecting a referee and having him hear the facts, with the court reviewing the findings. E.G. *In re Riddle*, 57 Cal. 2d 848, 853, 22 Cal. Rptr. 472. Inherent in this procedure of having the court review the findings of the referee is the court's examination of a transcript of the evidence. Thus there could be no issue about preparing the transcript subsequently to present it to a higher or federal court as it has already been prepared.

F. Any Value to Petitioner in Having Transcripts of the Evidentiary Hearing Before He States His Allegations Is Outweighed by the Economic Waste in Permitting It Without Such a Screening

The main argument seems to be that petitioner needs the transcripts in order to frame his allegations to the appellate courts. Certainly petitioner did not make a substantial showing of any special need in his particular case. That is, he didn't allege that he had forgotten the testimony or that he had any other inability with respect to writing his recollections into new allegations. He was at least as well off in going to the appellate courts as he was coming into the Superior Court. He spoke of wanting the transcript "as reference in the aid of the preparation for a writ." His position seems to rest on the assumption that need comes about from only the circumstance of applying to a higher court for a writ. He argues that any person with funds would obviously have made such a transcript available to the court, and that when appealing the Attorney General would receive a transcript. He asserts that a nonindigent could purchase a transcript to more effectively prepare and prosecute his further petitions.

As to the fact that the Attorney General would secure a copy of the transcript if he takes an appeal after habeas corpus is granted to a prisoner, this is undoubtedly true, but the circumstances are fundamentally dissimilar. The courts in this area are obliged to deal with a large number of applications from prisoners and reasonable procedures for processing them are necessary. The federal rules do not require an Attorney General to secure a certificate of probable cause. Rule 22(b) of the Federal Rules of Appellate

Procedure. While the petitioner can file new applications in the appellate courts, unless the Attorney General has this right of appeal the government would be cut off entirely. See *Matter of Hughes*, 159 Cal. 360, altered by the later adoption of section 1506 of the California Penal Code.

Turning to the issue of need for the transcript, it is perhaps not unreasonable to note that need also is not a mathematical word. What one "needs" may depend to some extent on one's accustomed standard of living. Two points of reference, however, may be fairly fixed. The transcript is not a condition precedent to having the appellate court consider the case. It is not only possible to proceed by framing allegations without the transcript but usual to do so. On the other hand, it cannot be said that the transcript would necessarily be totally valueless in the process of applying for a writ in the appellate court.

However, because petitioner has prepared allegations in the Superior Court that have resulted in a hearing, he has afforded us a convincing demonstration that he is able to make a similar presentation to the appellate court. His consultations with an attorney through the hearing and the evidentiary hearing itself should put him in a better position to present a new petition. As it is not the law that a petitioner is entitled to an evidentiary hearing to help him frame his allegations, so it should not be the law that he is entitled to a transcript of such an evidentiary hearing. We submit that it can fairly be said that need and value under these circumstances are relatively slight, and may be nonexistent. Certainly evidence to support the allegations is not essential in presenting a habeas corpus

petition, which is scrutinized as a pleading. Petitioner's concession that he had a full and fair hearing in the Superior Court (A.36, 47, 56) would make a transcript unnecessary to review errors in that category.

To the extent that there would be value to the petitioner, we would place the situation in the general rule that does not make appointment of counsel automatic, or the furnishing of the transcript of the criminal case automatic, or a hearing automatic. Whatever aid the transcript would be is under these circumstances outweighed by the economic cost involved in furnishing it without a showing of specific need and substantiality of the issues. It would be anomalous unconditionally to furnish a petitioner a transcript of the hearing on his habeas corpus case without any test but not let him have the transcript of his criminal trial to bring habeas corpus until he supplies allegations. See *People v. Hill*, 67 Cal. 2d 105, 122-125, 60 Cal. Rptr. 234.

It may be true that a man of immense weath would want a transcript of his hearing for appellate purposes. It might also be true that a nonindigent of even substantial means would feel that this is not a prudent expenditure of funds. We do not have an obligation to obliterate the lines between rich and poor regardless of the lack of practicality or the expense involved. As the Court reminded us in *Douglas v. California*, 372 U.S. 353, 356-57 (1963):

> "But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *William v. Lee Optical Co.*, 348 U.S. 483, 489; *Griffin v. Illinois*, supra, p. 18.

Absolute equality is not required; lines can be and are drawn and we often sustain them. See Tigner v. Texas, 310 U.S. 141; Goesaert v. Cleary, 335 U.S. 464."

Thus we conclude that it does not offend equal protection or due process to require allegations to precede the furnishing of transcripts.[5]

G. The Federal Habeas Corpus Remedy Is Not Impaired by California's Procedures

Finally, we turn to petitioner's contention that the failure to give him this transcript impairs the effectiveness of the federal habeas corpus remedy. He seems to be dissatisfied with the way 28 U.S.C. section 2254 has been amended and seeks to have this court repair the alleged deficiencies in the power of the federal courts to order a transcript by having the state supply he transcript as a matter of absolute right. (Pet. Op. Br. p. 19.)

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[5]As the Court is aware, there are two other petitions for certiorari by petitioner pending before it, filed as Nos. 894 Misc. and 1061 Mis., October Term 1967. The story of what happened after the request for transcripts in the Superior Court is unfolded therein. They tell that petitioner presented his substantive allegations in the State Supreme Court in the form of petitions for mandamus or injunction in the latter part of June 1967, and for habeas corpus in July, and they were denied. (Copies of the documents were furnished as exhibits to the petition for certiorari filed on November 7, 1967. However, after the evidentiary hearing in the Superior Court and before the petitions in the Supreme Court, the State Supreme Court decided *In re Allison*, 66 Cal. 2d 282, 288-292, 57 Cal. Rptr. 593 and *In re Schoengarth*, 66 Cal. 2d 295, 305, 57 Cal. Rptr. 600. The thorough review of the prison regulations in those cases and the sustaining of them at the least greatly reduced the need for a transcript. Possibly petitioner could contend his "need" continued to exist to make a presentation to this court or federal courts, see *Gilmore v. Lynch*, ... F. 2d ...., Ninth Circuit No. 22052, decided August 19, 1968, or that some issue was not fully covered by *Allison* and *Schoengarth*. He complained that Allison infringes on the rights of California prisoners and that the Department had "perverted" the decision. (Pet. for Mand., p. 10.)

Prior to the amendment of the statute, the federal courts were insistent upon the federal district judge reviewing the state transcript before the findings from the state hearing could be accepted in lieu of conducting a federal hearing. *See Pike v. Dickson*, 323 F. 2d 856, 861 (8 Cir. 1963); *Chaves v. Dickson*, 280 F. 2d 727, 733 (8 Cir. 1960).

The general effect of the amendment appears to be to permit a federal district judge to accept the written findings of a state court without going into the transcript unless the findings are challenged in some way as not being supported by the evidence or because the hearing was not fair.

It also vests a new power in the District Courts to order "an appropriate State official" to produce a state record where the applicant challenges the sufficiency of the evidence to support the state determination. 28 U.S.C. §2254(e).

It conspicuously avoids any right to transcripts merely for the purpose of preparing the petition and the power to order the preparation of transcripts is vested in the court before which the allegations are made at a time subsequent to the making of the allegations.

If there is a suggestion that the statute will be applied unfairly, we can only express confidence that the federal courts will not so interpret it or apply it. Apart from the general situation that the petitioner must express his allegations, we see no substantial limitation on the petitioner. The statute simply appears to be aimed at not requiring the preparation of transcripts unless some complaint is made of the state fact finding process.

Petitioner cites Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895 (1966). This does not support him, and merely speaks (at p. 928) of requiring states to prepare records for indigent *prisoners who raise substantial questions in federal habeas corpus petitions.*" (Emphasis added.) Citing 28 U.S.C. §2250 (1964).

Conclusion

For the foregoing reasons it is respectfully requested that the order of the San Luis Obispo Superior Court be affirmed.[*]

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

JACK K. WEBER,
Deputy Attorney General of the State of California,

Attorneys for Respondent.

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[*]We note that appointed counsel has not urged some of the claims advanced in the petition for writ of certiorari, particularly that the Superior Court was arbitrary in changing the label of the petition for a writ of mandamus to habeas corpus, a nonappealable proceeding for a petitioner. However, we have limited ourselves to answering the arguments advanced in the petitioner's opening brief.